

IN THE COURT OF APPEAL OF SEYCHELLES

[2020] SCCA 18 December 2020
SCA 09/2018
(Appeal from CS 32/2011)

AHTEE LABONTE
(rep. by Mr. Guy Ferley)

Appellant

and

LUCY FRED
(rep. by Mr. Joel Camille)

Respondent

Neutral Citation: *Labonte v Fred* (SCA 09/2018) [2020] SCCA - (18 December 2020).

Before: Twomey, Robinson, Tibatemwa-Ekirikubinza JJA

Summary:

Heard: 7 December 2020

Delivered: 18 December 2020

ORDER

JUDGMENT

TIBATEMWA-EKIRIKUBINZA, JA (TWOMEY, ROBINSON JJA CONCURRING)

Facts

1. In 2008, Ahtee (the appellant) purchased from Lucy Fred (the respondent) property situated at Anse Consolation Praslin described as parcel PR. 1541 together with developments on the said property. The consideration indicated in the agreement of purchase was SR 1,000,000/=. Ahtee thereafter took possession of the property. She however acknowledged in the plaint that she had a balance of SR 41,900 to clear.
2. Thereafter, Ahtee appointed Mr. Gerard Maurel as notary to complete the transfer of the said parcel. However, Lucy Fred stopped the notary from transferring the parcel and registering it, on the premise that the actual consideration was SR 2,500,000/= plus 25,000 pound sterling and not SR 1,000,000/=. That the sale agreement indicated SR 1,000,000 as consideration for the benefit of paying low stamp duty. Lucy Fred further averred that she had been paid only SR 858,100 and was awaiting clearing of the balance in the sum of SR 1641,900 plus 25,000 pounds.
3. Ahtee considered Lucy Fred's actions as a breach of contract and sued her in the Supreme Court for the following orders:
 - (a) An injunction ordering the notary-Mr. Gerard to immediately deposit and register the said transfer.
 - (b) An injunction ordering the Registrar of Lands to effect the registration of the parcel in his name.
 - (c) Lucy Fred be ordered to do the legal necessities including consent and instruct the said notary and Registrar of Lands to deposit, register and give full effect to the transfer document.
 - (d) Lucy Fred be ordered to accept from Ahtee the remaining balance of SR 41,900 as part of the transfer sum.
 - (e) Any necessary order the court requires to give effect to the sale agreement.
4. In her defence, Lucy Fred made a counter claim stating that Ahtee had undertaken to clear all her arrears which were amounting to SR 80,663.84 owed to the Housing Finance Company. That this amount had accumulated to SR 147,902.56 by 2013 and she had to clear it herself. That Ahtee's failure to clear the said amount also amounted to breach of agreement. She therefore prayed that:

- (i) The court declares the transfer void on account of breach of agreement, dismiss Ahtee's plaint and give judgment in favour of the counterclaim made amounting to a total sum of SR 1,909,138.72 plus 25,000 pounds.
5. At the hearing in the Supreme Court, Ahtee raised a preliminary objection to the admissibility of Fred Lucy's oral evidence proving her claim that the price orally agreed upon was SR 2,500,000 plus 25,000 pounds and yet this was not written anywhere.
6. The Judge overruled the objection and allowed Lucy Fred to adduce oral evidence to establish the price agreed upon.
7. In regard to the merits of the case, the Supreme Court Judge found that on a balance of probabilities, Ahtee had failed to prove her case and that Lucy Fred appeared to be a more credible party. The Judge was satisfied that there was an oral agreement between the parties. The Judge therefore held in favour of Lucy Fred and granted the counter claim. He ordered Ahtee to pay the sum of SR 1,909,138.72 plus 25,000 pounds.
8. Dissatisfied with the decision Ahtee appealed to this Court on the following grounds:
 1. **The learned Judge erred in law in finding that the oral testimony was admissible in law as against a written agreement.**
 2. **The learned Judge erred in law in failing to find that the appellant had proven her case with documentary evidence including receipts of payment and a written signed agreement which was retained by the notary.**
 3. **The learned Judge erred in law in failing to take into account the payment made by the appellant and the prayer of the appellant for the land to be registered in his name as the owner.**
 4. **The learned Judge erred in law in failing to find the respondent's counterclaim not proven to the required standard of law.**

Prayers

9. The appellant prayed that this Court sets aside the Judgment of the Supreme Court and that the suit land be registered in her name as owner.

Appellant's submissions

Ground 1

10. Counsel for the appellant submitted that the oral testimony of the respondent was inadmissible because it was contrary to **Articles 1341 and 1321 (4)** of the **Civil Code Act**. The Articles provide as follows:

Article 1341

Any matter the value of which exceeds 5000 Rupees shall require a document drawn up by a notary or under private signature, even for a voluntary deposit, and no oral evidence shall be admissible against and beyond such document nor in respect of what is alleged to have been said prior to or at or since the time when such document was drawn up, even if the matter relates to a sum of less than 5000 Rupees.

11. **Article 1321(4)**

Any back-letter or other deed, other than a back-letter or deed as aforesaid, which purports to vary, amend or rescind any registered deed of or agreement for sale, transfer, exchange, mortgage, lease or charge or to show that any registered deed of or agreement for, or any part of any registered deed of or agreement for, sale, transfer, mortgage, lease or charge of or on any immovable property is simulated, shall in law be of no force or avail whatsoever unless it shall have been registered within six months from the date of the making of the deed or of agreement for sale, transfer, exchange, mortgage, lease or charge of or on the immovable property to which it refers.

12. Counsel submitted that the above provisions of law do not afford the respondent any exception to give evidence contrary to the written and signed agreement. Counsel thus faulted the learned Judge for misinterpreting and misapplying the law.

Grounds 2 and 3

13. The appellant's counsel addressed these grounds together as they both rotate around the documentary evidence adduced.

14. The appellant argued that the only proper evidence was the written agreement and the payment summary signed by the appellant and the respondent. That the learned trial Judge erred in overruling the objection to the admissibility of Lucy Fred's oral evidence and yet held subsequently that “... *mere oral agreement without any documentation cannot on its own constitute a valid 'back letter' in the eye of the law.*”
15. Counsel argued that a back letter needs to be in writing and registered within 6 months. That in the absence of a back letter, a court has no authority to accept oral evidence against the written agreement.
16. Furthermore, counsel argued that the Judge erred in allowing the counterclaim and ordering the appellant to pay SR 1,848,900 and 25,000 pounds claimed by the respondent as balance of the purchase price. That the effect of such an order allows the respondent to have benefit of the balance as well as maintain the land title. In conclusion, counsel maintained that the appellant had proved her action in accordance with the written agreement.

Ground 4

17. Counsel argued that unlike the appellant who proved her claim with evidence of a written agreement and a signed payment summary, the respondent had failed to prove her case on a balance of probabilities.

Respondent's submissions

Ground 1

18. Counsel for the respondent submitted that the respondent's oral testimony was an exception to the rule espoused by **Article 1341 (supra)**. That in fact **Article 1347** of the **Civil Code** provides for exceptions to the applicability of Article 1341. **Article 1347** provides that:

The aforementioned rules shall not apply if there is writing providing initial proof.

19. **This term describes every writing which emanates from a person against whom the claim is made, or from a person whom he represents, and which renders the facts alleged likely.**
20. Counsel argued that indeed the learned trial Judge appreciated that the present case fell under the exception created under Article 1347 (supra). Counsel referred to the judgment of the trial Judge at page 106 of the record. The relevant portion of the judgment states as follows:

“Firstly, on the issue as to admissibility of oral evidence, it is evident that exhibit P1 and P3 which have been duly signed by and emanating from the plaintiff, clearly provide for a beginning of proof in writing. This writing as I see it, squarely falls within the description of the term “every writing”, which has been used in a broad sense in Article 1347 supra to cover all writings including the ones in the nature of exhibit P1 and P3. Moreover, these documents create liability on the part of the plaintiff to pay the purchase price to the defendant. This obviously, constitutes an exception to the rule, which entitles the Defendant to give oral evidence of the real price other than what is declared in the transfer deed.”

21. On the premise of the above, counsel submitted that the learned trial Judge cannot be faulted for having allowed the oral evidence.
22. Furthermore, counsel submitted that the appellant erroneously based his objection under Article 1321 which deals exclusively with the question of simulation through a back letter. He argued that Article 1321 does not provide for an avenue for objection to admissibility of oral evidence. He thus prayed that this ground of appeal be dismissed for lack of merit.

Grounds 2, 3, and 4

23. Under these grounds, counsel for the respondent conceded that an agreement by the parties to indicate a lesser sum payable on the contract than was actually payable for the purpose of paying less stamp duty would be illegal and the Court would not be able to condone it.
24. Notwithstanding the above, counsel argued that even if the written agreement was to be considered as the binding evidence, the appellant had failed to pay the full amount indicated in the agreement within the ‘stipulated time’. That therefore, the agreement ought to be nullified or terminated. Counsel referred to a letter dated 13th June, 2010 by which vacant possession was demanded on the basis that the appellant had breached the agreement between the parties in failing to pay the balance due on the agreement “despite various requests”. Counsel further argued that the oral evidence as to the non-payment of the due balance on time ought to have been admitted. He however conceded that although no cross-appeal had been made on this aspect, it was part of the prayers in the lower court.

Court’s consideration

25. Before I delve into the merits of this appeal, I take exception with the way the grounds of appeal were framed. They were vague, not concise and argumentative. This contravened **Rule 54(3) and (6)** of the Rules of this Court which requires every Notice of Appeal to set forth concisely and under distinct heads, without argument or narrative, the grounds of the appeal, specifying the points of law or fact which are alleged to have been wrongly decided.
26. Nevertheless, in the interest of justice, I will address the merits of the appeal.

Ground 1

27. The essence of the arguments under this ground were that the learned trial Judge erred in over ruling the objection to the admissibility of oral evidence by the respondent.
28. The question before Court is *whether the respondent's oral testimony which would contradict the written agreement was admissible.*
29. At the trial, the appellant adduced a written transfer agreement as evidence of the agreement between himself and the respondent indicating that the purchase price was SR 1,000,000/= . On the other hand, the respondent claimed that the price agreed upon was not SR 1,000,000/= but SR 2,500,000 and 25,000 pounds. The respondent testified that the price in the written agreement was only inserted in order to pay less stamp duty.
30. **Articles 1341** of the **Civil Code** which I have already reproduced above requires that a matter whose value exceeds 5000 Rupees shall be reduced into writing and any contradicting oral evidence alleged to have been said prior to, at or after the written document is not admissible.
31. **Article 1347 of the Civil Code** is to the effect that the aforementioned rules (Articles 1341-1346) shall not apply if there is writing providing initial proof. This provision was the anchor of the respondent's arguments and his counsel submitted that Article 1347 creates an exception to the operation of Article 1341 and thereby permits for oral evidence to be given. It was this provision that the learned Judge based his decision to admit the respondent's oral evidence.
32. Although **Article 1347 of the Civil Code** creates an exception to the parole evidence rule espoused in **Article 1341**, it is my finding that the respondent did not bring herself within the ambit of that exception. **Article 1347** further provides that:

“The term [writing providing initial proof] describes every writing which emanates from a person against whom the claim is made, or from a person whom he represents, and which renders the facts alleged likely.”
33. In light of the above provision, a writing emanating from the appellant and which provides initial proof rendering the facts alleged by the respondent to be likely, may have been admissible. However, no such writing existed here. The respondent relied on a payment summary dated 22nd September, 2009 (Exhibit D1), which was signed by herself as well as the appellant. In this document, the respondent acknowledged that the appellant had so far paid SR 858,100/= in respect to the purchase of the suit property. This particular

document did not provide proof of the allegation that the purchase price was in fact SR 2,500,000 and 25,000 pounds. It neither indicated that the balance due exceeded SR 1,000,000/= nor that the payments made so far were beyond the sum mentioned in the written agreement. If this had been the case, which was not, the respondent's oral evidence would have been admissible.

34. Since the transaction in question exceeded SR 5000, by virtue of **Article 1341 (supra)**, I find that the respondent's oral evidence which contradicted the written agreement was inadmissible.
35. I will now move to address another limb of the arguments under this ground. The respondent's counsel in his oral submissions pointed out that the agreement to indicate a less sum as consideration for the purpose of paying low stamp duty constituted an oral back-letter and a simulation.
36. In **Sidna Ruddenklau vs. Timm Adolf Botel (SCA No. 4 of 1995)**, this Court defined 'simulation' as: "*the concealment by the [parties] of the true nature of their agreement behind the façade of a disguised transaction which the parties never intended to have the ostensible effect.*" It has also been defined by **Black's Law Dictionary** (9th Edition, at page 1510) as: "*an assumption of an appearance that is feigned, false, or deceptive.*"
37. In the **Sidna Ruddenklau** decision, this Court stated that a back letter provides evidence of and may itself be written or oral depending on the circumstances and precise provisions of the relevant law. The Court however noted that back-letters in relation to immovable property transactions have to be written and registered within six months as a formal rather than an evidentiary requirement of **Article 1321(4) of the Civil Code**.
38. In light of the above decision, I find that the respondent's oral back letter is void on two fronts. First, because all back letters purporting to show that the consideration for the sale of immovable property is greater than that which is set out in the agreement of sale are deemed fraudulent and void by dint of **Article 1321(3) and (4) of the Civil Code**. It provides as follows:

3. Back-letters purporting to show that the real consideration for the sale or exchange of immovable property or commercial property or office is greater than the consideration set down in the deed of sale or exchange, or that a gift inter vivos of immovable property, commercial property or office is in reality a sale, exchange, mortgage, transfer or charge, shall be deemed to be fraudulent and shall in law be of no force or avail whatsoever.
39. Courts will not condone illegalities or fraud. Courts will not be used to give effect to fraudulent transactions. In the persuasive Ugandan *locus classicus* decision of **Makula**

International Ltd vs. H.E. Cardinal Emmanuel Nsubuga, (Civil Appeal No. 4 of 1981, reported in [1982] HCB at page11), Court enunciated the principle that a Court of law cannot sanction that which is illegal. In another persuasive Ugandan authority of **Betty Kizito vs. David Kizito Kanonya and 7 Others (Supreme Court Civil Appeal No. 8 of 2018)**, the Supreme Court of Uganda vitiated a land transaction in which a false consideration for the sale of land and its development status were declared for the purpose of defrauding the Ugandan Government of the fully payable stamp duty.

40. Secondly, even if the back-letter in question had not been fraudulent and void by dint of **Article 1321(3)** of the **Civil Code**, it would nevertheless be void and ineffectual for want of form. **Article 1321(4)** of the **Civil Code** requires that a back letter in respect of immovable property be reduced into writing and registered within six months after its execution. The Article provides as follows:

4. Any back-letter or other deed, other than a back-letter or deed as aforesaid, which purports to vary, amend or rescind any registered deed of or agreement for sale, transfer, exchange, mortgage, lease or charge or to show that any registered deed of or agreement for, or any part of any registered deed of or agreement for, sale, transfer, mortgage, lease or charge of or on any immovable property is simulated, shall in law be of no force or avail whatsoever unless it shall have been registered within six months from the date of the making of the deed or of agreement for sale, transfer, exchange, mortgage, lease or charge of or on the immovable property to which it refers.

41. Arising from the above analysis, I find that the purported oral back letter was void and the learned trial Judge erred in finding that the respondent's oral evidence was admissible.

Therefore, ground 1 succeeds.

Ground 2

42. Under ground 2, it was argued for the appellant that the learned trial judge erred in failing to find that the appellant had proved his case to the required standard, having adduced documentary evidence of the transaction between himself and the respondent.
43. Having held in ground 1 that the respondent's oral evidence was inadmissible, it follows that the material evidence available is the written sale agreement.
44. I note that the learned trial judge made a finding that the respondent had a more probable case. It is clear that the Judge reached the finding premised on the erroneous admission of the respondent's oral evidence. Had he correctly excluded that testimony, he would have reached the conclusion that the appellant had proved his case to the required standard of proof.

45. **Consequently, ground 2 succeeds.**

Grounds 3 and 4

46. My findings in grounds 1 and 2 above substantially resolve grounds 3 and 4. A discussion of grounds 3 and 4 is therefore rendered unnecessary.

Conclusion

47. Arising from the analysis, I come to the conclusion that the appeal succeeds.

48. Consequently, the judgment and orders of the learned trial judge are hereby set aside and judgment is instead entered in favour of the appellant with the following orders:

1. The appellant is ordered to, within one month from the date of this judgment, pay the sum of SR 141,900 to the defendant as the balance due on the written agreement of sale of the suit property;
2. Upon effecting the payment referred to in (1) above within the stipulated time and upon proof of payment thereof:
 - a. The respondent is ordered to do all that is necessary to give effect to the transfer and registration of the suit property to and in the names of the appellant;
 - b. Mr. Gerard Maurel of Kingsgate House Victoria, Mahe, is equally ordered to lodge and register the requisite transfer of the suit property to the appellant; and
 - c. The Registrar of Lands is equally ordered to give effect to the abovementioned registration and transfer of the suit property in favour of the appellant.
3. The appellant shall bear the transactional costs of effecting the transfer and registration of the suit property to himself.
4. The respondent shall pay the appellant's costs in this Court and in the Court below.

Signed, dated and delivered at Ile du Port on 18 December 2020.

Tibatemwa

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Tibatemwa-Ekirikubinza, JA

I concur
Twomey, JA.

I concur
Robinson, JA.

Signed, dated and delivered at Ile du Port on 18 November 2020